

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

MICHAEL SEAN SEAMON,

No. 03:10-cv-06421-HU

Plaintiff,

**FINDINGS AND
RECOMMENDATION**

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

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1 HUBEL, Magistrate Judge:

2 Currently before the Court is Plaintiff Michael Seamon's
3 ("Plaintiff") unopposed motion for attorneys' fees pursuant to 42
4 U.S.C. § 406(b). The fee requested is \$4,580.50, which Plaintiff's
5 counsel represents to be "25% of Plaintiff retroactive benefits,
6 less \$5,912, a sum that was paid to Mark Manning, one of the
7 attorneys of record for Plaintiff, under 42 U.S.C. § 406(a) for his
8 services to Plaintiff in the administrative proceeding." (Pl.'s
9 Mot. at 1.) Based on the factors established in *Gisbrecht v.*
10 *Barnhart*, 535 U.S. 789 (2002), and explained in *Crawford v. Astrue*,
11 586 F.3d 1142 (9th Cir. 2009) (en banc), Plaintiff's motion (Docket
12 No. 24) for § 406(b) fees should be granted.

13 **I. BACKGROUND**

14 Plaintiff filed this action on December 20, 2010, seeking
15 judicial review of the Commissioner of Social Security's
16 ("Commissioner") denial of his applications for disability
17 insurance benefits ("DIB") and supplemental security income ("SSI")
18 benefits under Titles II and XVI of the Social Security Act. In
19 his opening brief, filed on December 7, 2011, Plaintiff asserted
20 four grounds upon which the Administrative Law Judge's ("ALJ")
21 decision should be reversed: (1) the ALJ erred by failing to
22 develop the record regarding Plaintiff's cognitive and mental
23 limitations; (2) the ALJ erred by failing to find that Plaintiff's
24 cerebral palsy condition met or equaled the criteria of Listing
25 11.07; (3) the ALJ failed to give clear and convincing reasons for
26 rejecting Plaintiff's testimony; and (4) the Commissioner did not
27 meet his burden of proving that Plaintiff retains the ability to
28 perform "other work" in the national economy.

On March 1, 2012, the parties, acting through their respective counsel, stipulated that this case be reversed and remanded to the Commissioner for further administrative proceedings before an ALJ, a de novo hearing, and new decision. On remand, the ALJ was directed to (1) retrieve, include as an exhibit, and evaluate the missing 1995 report by Dr. David Starr, wherein Dr. Starr found Plaintiff suffered from a learning disability; and (2) order a new neuropsychological consultative examination. Based on the stipulation of the parties, on March 5, 2012, Judge Hernandez entered an Order and Judgment of Remand pursuant to sentence four of 42 U.S.C. § 405(g).

On October 16, 2012, Judge Hernandez adopted this Court's Findings and Recommendation, wherein it recommended granting Plaintiff's stipulated motion for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. About one year later, on October 9, 2013, after receiving a favorable decision upon reconsideration, Plaintiff filed his motion for § 406(b) fees, which is presently before the Court. Although Plaintiff was awarded \$3,475.86 in EAJA fees in October 2012, the award "was garnished to pay Plaintiff's debt to the government and therefore will not be subtracted" from counsel's motion for § 406(b) fees. (Pl.'s Mot. at 1-2.)

II. LEGAL STANDARD

A. The Statute

In Social Security cases, attorney fee awards are governed by § 406(b), which provides in pertinent part:

(1) (A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine

1 and allow as part of its judgment a reasonable fee for
2 such representation, not in excess of 25 percent of the
3 total of the past-due benefits to which the claimant is
entitled by reason of such judgment[.]

4 42 U.S.C. § 406(b)(1)(A).

5 **B. Controlling Precedent**

6 *Gisbrecht* concerned fees awarded under § 406(b). *Gisbrecht*,
7 535 U.S. at 792. Specifically, the Supreme Court addressed the
8 question, which sharply divided the Federal Courts of Appeals:
9 "What is the appropriate starting point for judicial determinations
10 of a reasonable fee [under § 406(b)] for representation before the
11 court?" *Id.*

12 For the purposes of the opinion, the Supreme Court
13 consolidated three separate actions where the District Court, based
14 on Circuit precedent, declined to give effect to the attorney-
15 client fee arrangement. *Id.* at 797. Instead, the District Court
16 employed a lodestar method whereby the number of hours reasonably
17 devoted to each case was multiplied by a reasonable hourly fee.
18 *Id.* at 797-98. The *Gisbrecht* court concluded that § 406(b)
19 requires a court to review the contingent-fee arrangement, to
20 assure they yield reasonable results. *Id.* at 807. Congress
21 provided one boundary line: contingent-fee agreements are
22 unenforceable if they exceed 25% of past-due benefits. *Id.* Within
23 that 25% boundary, however, "the attorney for the successful
24 claimant must show that the fee sought is reasonable for the
25 services rendered." *Id.*

26 Courts are instructed to first test the contingent-fee
27 agreement for reasonableness. *Id.* at 808. An award of § 406(b)
28 fees can be appropriately reduced based on (1) the character of the

1 representation; (2) the results achieved; (3) when representation
2 is substandard; (4) if the attorney is responsible for delay; and
3 (5) if the benefits are large in comparison to the amount of time
4 counsel spent on the case. *Id.* The claimant's attorney may be
5 required to submit a record of hours spent representing the
6 claimant and a statement of the lawyer's normal hourly billing
7 charge for noncontingent-fee cases in order to aid the court's
8 assessment of reasonableness. *Id.* Lastly, the *Gisbrecht* court
9 added that "[j]udges of our district courts are accustomed to
10 making reasonableness determinations in a wide variety of contexts,
11 and their assessments in such matters, in the event of an appeal,
12 ordinarily qualify for highly respectful review." *Id.*

13 In *Crawford*, the Ninth Circuit reviewed three consolidated
14 appeals and determined that, in each case, the district court
15 failed to comply with *Gisbrecht's* mandate. *Crawford*, 586 F.3d at
16 1144. In each of the three cases, the claimant signed a written
17 contingent-fee agreement whereby the attorney would be paid 25% of
18 any past-due benefits awarded. The *Crawford* court noted that
19 contingency-fee agreements, which provide for fees of 25% of past-
20 due benefits, are the norm for Social Security practitioners. *Id.*
21 at 1147. However, since the Social Security Administration ("SSA")
22 "has no direct interest in how much of the award goes to counsel
23 and how much to the disabled person, the district court has an
24 affirmative duty to assure the reasonableness of the fee is
25 established." *Id.* at 1149. Performance of that duty begins by
26 asking whether the amount of the fee agreement need be reduced. *Id.*

27 At the outset, the attorneys requested fees representing
28 13.94%, 15.12% and 16.95% of past-due benefits, *id.* at 1145-47,

1 because they felt "the full 25% fee provided for by their fee
 2 agreements would be unreasonable." *Id.* at 1150 n.8. If the
 3 attorneys had received the 25% fee provided for by their
 4 agreements, they would have been awarded fees ranging from
 5 \$19,010.25 to \$43,055.75. *Id.* at 1150. Even so, the district
 6 courts still reduced the contracted fees by between 53.7% and
 7 73.30%, which produced fees that represented 6.68% to 11.61% of the
 8 past-due benefits. *Id.* All three decisions were reversed because
 9 they relied on lodestar calculations and rejected the primacy of
 10 lawful attorney-client fee agreements. *Id.* That is to say, the
 11 district courts erroneously began with a lodestar calculation by
 12 comparing the lodestar fee to the requested fee award. *Id.* As the
 13 Ninth Circuit recognized:

14 In *Crawford*, for example, the district court awarded
 15 6.68% of the past-due benefits. From the lodestar point
 16 of view, this was a premium of 40% over the lodestar. .
 17 . . But from the contingent-fee point of view, 6.68% of
 18 past-due benefits was over 73% less than the contracted
 19 fee and over 60% less than the [already] discounted fee
 20 the attorney requested. Had the district court started
 with the contingent-fee agreement, ending with a 6.68%
 fee would be a striking reduction from the parties' fee
 agreement. This difference underscores the practical
 importance of starting with the contingent-fee agreement
 and not just viewing it as an enhancement.

21 *Id.* at 1150-51.¹.

22 III. DISCUSSION

23 A. The Fee Arrangement

24 Here, a contingent-fee agreement exists between Plaintiff and
 25 his attorney, which states: "My attorney and I agree that if SSA
 26 favorably decides the claim, I will pay my attorney a fee equal to

27 ¹ The attorneys in *Washington* and *Trejo* were dealt a 23% and
 28 47% reduction, respectively. *Id.* at 1151 n.9.

1 25% of the past-due benefits resulting from my claim or [the
2 maximum amount recoverable under § 406(a)], whichever is less.”
3 (Pl.’s Mem. Supp., Ex. C at 1.) By its terms, the contingent-fee
4 agreement is within the statutory limits.

5 The next inquiry is whether the fee sought exceeds § 406(b)’s
6 25% ceiling, which requires evidence of total past-due benefits.
7 *Dunnigan v. Astrue*, No CV 07-1645-AC, 2009 WL 6067058, at *9 (D.
8 Or. Dec. 23, 2009). According to the SSA’s Notice of Award,
9 Plaintiff received \$41,970 in past-due benefits and the SSA
10 withheld 25% (\$10,492.50) to cover potential attorneys’ fees under
11 § 406(b). Plaintiff’s counsel only seeks \$4,580.50 in fees, which
12 represents the difference between 25% of past-due benefits awarded
13 (\$10,492.50) and the amount awarded to Mark Manning under § 406(a)
14 (\$5,912).

15 **B. The Reasonableness of the Fee Sought**

16 Since the statutory ceiling has not been exceeded, the Court
17 turns now to my primary inquiry, the reasonableness of the fee
18 sought.

19 **1. Character of Representation**

20 Substandard performance by a legal representative warrants a
21 reduction in a § 406(b) fee award, as *Gisbrecht* and *Crawford* make
22 clear. See *Gisbrecht*, 535 U.S. at 808; *Crawford*, 586 F.3d at 1151.
23 Examples of substandard representation include poor preparation for
24 hearings, failing to meet briefing deadlines, submitting documents
25 to the court that are void of legal citations, and overbilling
26 one’s clients. *Dunnigan*, 2009 WL 6067058, at *11 (citing *Lewis v.*
27 *Sec’y of Health and Human Servs.*, 707 F.2d 246, 250-51 (6th Cir.
28 1983)).

1 The record in this case provides no basis for a reduction in
2 the requested § 406(b) fee due to the character of counsel's
3 representation.

4 **2. The Results Achieved**

5 With respect to the results achieved, the Court's assessment
6 should focus on whether counsel's efforts made a meaningful and
7 material contribution. *Dunnigan*, 2009 WL 6067058, at *11 (citation
8 omitted). In this case, counsel made a meaningful and material
9 contribution to their client in this case. Indeed, counsel's
10 opening brief clearly persuaded the Commissioner that remand was
11 necessary in this case, and upon remand, Plaintiff was awarded
12 past-due benefits.

13 **3. Delay Attributable to the Attorney**

14 The Court may reduce a § 406(b) fee for delays in the
15 proceedings attributable to the claimant's attorney. *Crawford*, 586
16 F.3d at 1151. The *Gisbrecht* court observed that a reduction on
17 this ground is appropriate if the requesting attorney
18 inappropriately caused delay in proceedings, so that the attorney
19 "will not profit from the accumulation of benefits" while the case
20 is pending. *Gisbrecht*, 535 U.S. at 808.

21 No reduction is warranted under this factor. Plaintiff's
22 counsel acted diligently throughout this proceeding.

23 **4. Proportionality of the Fee Request to the Time Expended**

24 The Court may reduce a § 406(b) fee "for . . . benefits that
25 are not in proportion to the time spent on the case." *Crawford*,
26 586 F.3d at 1151 (citation omitted). Courts may look to counsel's
27 record of hours spent and a statement of normal hourly billing in
28 order to make such a determination. *Id.*

1 According to Plaintiff's counsel, 19.25 hours were reasonably
2 expended on the merits of this case, which results in an
3 effectively hourly rate of \$545 (\$4,580.50 plus \$5,912 in fees
4 under § 406(a), divided by 19.25) if the requested fee was
5 approved. A much lower hourly rate of \$237.95 is produced when the
6 requested § 406(b) of \$4,580.50 is divided by 19.25 hours. "There
7 is some consensus among the district courts that 20-40 hours is a
8 reasonable amount of time to spend on a Social Security case that
9 does not present particular difficulty." *Harden v. Comm'r Soc.*
10 *Sec. Admin.*, 497 F. Supp. 2d 1214, 1215 (D. Or. 2007). Because
11 Plaintiff's fee request is not excessively large in relation to the
12 benefits received, and because Plaintiff's expended a reasonable
13 amount of time on this proceeding, no reduction is warranted under
14 this factor.

15 IV. CONCLUSION

16 For the reasons stated, Plaintiff's unopposed motion (Docket
17 No. 24) for fees under § 406(b) should be granted. Plaintiff's
18 counsel should be awarded \$4,580.50 in § 406(b) fees.

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22 V. SCHEDULING ORDER

23 The Findings and Recommendation will be referred to a district
24 judge. Objections, if any, are due **January 2, 2014**. If no
25 objections are filed, then the Findings and Recommendation will go
26 under advisement on that date. If objections are filed, then a
27 response is due **January 21, 2014**. When the response is due or
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1 filed, whichever date is earlier, the Findings and Recommendation
2 will go under advisement.

3 Dated this 9th day of December, 2013.

4 /s/ Dennis J. Hubel

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6 DENNIS J. HUBEL
7 United States Magistrate Judge
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